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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

6 JOHN BEJARANO,

7 Petitioner

8 v.

9 WILLIAM GITTERE,¹ et al.,

10 Respondents
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Case No.: 2:98-cv-01016-GMN-NJK

ORDER

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13 Petitioner Bejarano is a Nevada prisoner sentenced to death. On September 2, 2010, this
14 court entered a final judgment denying Bejarano's petition for writ of habeas corpus under 28
15 U.S.C. § 2254. ECF No. 163. Bejarano's appeal of that judgment remains pending before the
16 Ninth Circuit. Now before the court is Bejarano's motion for relief from judgment pursuant to
17 Rule 60(b) of the Federal Rules of Civil Procedure. ECF No. 199. Bejarano argues that this
18 court's dismissal of several of his habeas claims on timeliness grounds should be revisited in
19 light of the Ninth Circuit's intervening decision in *Williams v. Filson*, 908 F.3d 546 (9th Cir.
20 2018). For reasons that follow, the motion is denied.
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23 ¹ William Gittere is automatically substituted for Timothy Filson as the Warden of Ely State
Prison. Aaron Ford is automatically substituted for Adam Paul Laxalt as the Attorney General
for the State of Nevada. FED. R. CIV. P. 25(d).

1 As an initial matter, this court is without jurisdiction to rule upon a motion seeking relief
2 from judgment while Bejarano’s case is on appeal to the Ninth Circuit. *See Williams v.*
3 *Woodford*, 384 F.3d 567, 586 (9th Cir. 2004) (concluding that district court lacked jurisdiction
4 over petitioner’s Rule 60(b) motion filed subsequent to notice of appeal). Even so, a party may
5 “ask the district court for an indication that it is willing to entertain a Rule 60(b) motion. If the
6 district court gives such an indication, then the party should make a motion in the Court of
7 Appeals for a limited remand to allow the district court to rule on the motion.” *Sierra Pacific*
8 *Industries v. Lyng*, 866 F.2d 1099, 1113 n. 21 (9th Cir. 1989); *see also, Gould v. Mutual Life*
9 *Insurance Co.*, 790 F.2d 769, 772 (9th Cir. 1986).

10 This practice has been adopted by the Federal Rules of Civil Procedure. Rule 62.1(a)
11 states, “If a timely motion is made for relief that the court lacks authority to grant because of an
12 appeal that has been docketed and is pending, the court may: (1) defer considering the motion;
13 (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals
14 remands for that purpose or that the motion raises a substantial issue.” The third option is often
15 referred to as an “indicative ruling.” *See Fed. Ct. App. Manual* § 15:12.5 (5th ed.). With this in
16 mind, the court will address Bejarano’s motion for relief under Rule 60(b) despite lacking
17 jurisdiction to rule upon it.

18 In *Williams*, the petitioner filed his initial petition within the one-year statutory period
19 imposed by AEDPA² (28 U.S.C. § 2244(d)) but filed his amended habeas petition raising new
20 claims over a year beyond the end of the period. *Id.* at 557. While added claims that “relate
21 back” to the initial petition under Fed. R. Civ. P. 15(c) may be considered timely, the *Williams*
22 court opted not to address relation-back because it concluded that petitioner was entitled to
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² The Antiterrorism and Effective Death Penalty Act of 1996.

1 equitable tolling for the period between the statutory deadline (August 29, 1998) and the date he
2 filed his amended petition (September 17, 1999). *Id.* at 558. In particular, the court granted
3 equitable tolling based on petitioner’s reasonable reliance, during the relevant time period, on the
4 unsettled state of the law applying “relation back” in the federal habeas context. *Id.* at 559-60.

5 The court found petitioner’s reliance was “eminently reasonable” because (1) as of
6 August 1998 (i.e., the AEDPA deadline) petitioner’s counsel “had no reason to suspect that Rule
7 15(c) would pose an obstacle to consideration of newly added claims in an amended petition”
8 and (2) the federal district court and the State also assumed any newly added claims would relate
9 back. *Id.* at 560-61. With respect to the former, the court cited to the Ninth Circuit’s broad
10 construction of the relation-back standard that prevailed at the time. *Id.* at 560. As for the district
11 court, the court noted “the series of scheduling orders” that permitted petitioner additional time
12 to file his amended petition. *Id.*³ The court also noted that “the State waited *eight years* after
13 receiving the amended petition before moving to dismiss any of the claims on the ground that
14 they did not relate back to the original petition under Rule 15(c).” *Id.* at 561 (emphasis in the
15 original). The court summarized by stating that “it was not until the Supreme Court decided
16 *Mayle* [*v. Felix*, 545 U.S. 644 (2005),] that anyone involved in this case suggested that the newly
17 added claims might not relate back and could therefore be deemed untimely.” *Id.*

18 The circumstances for Bejarano are distinguishable. First, the State filed its motion to
19 dismiss Bejarano’s untimely claims (ECF No. 114) eight months, rather than eight years, after
20 receiving the relevant amended petition (ECF No. 106). Second, the relevant amended petition in
21 *Williams* was filed in 1999, several years *before* the *Mayle* decision in June 2005. Bejarano’s
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23 ³ These orders were entered in accordance with the “George Memo,” which established
standardized procedures for adjudicating federal capital cases in Nevada. *Id.* at 556.

1 untimely claims were added to his petition in May 2007. No plausible reading of *Williams* would
2 suggest that “reasonable reliance on the unsettled state of the law” can continue to serve as
3 grounds for equitable tolling for any period beyond the date on which the legal issue has been
4 squarely resolved. *See Williams*, 908 F.3d at 560 (citing to *Lawrence v. Florida*, 549 U.S. 327,
5 336, (2007), which held petitioner was not entitled to equitable tolling “where every circuit to
6 address an issue ... had resolved the issue adversely to him”). Accordingly, even if Bejarano
7 were to be granted equitable tolling until the date of the decision in *Mayle*, his amended claims
8 were still filed nearly a year late. *Cf. Grant v. Swarthout*, 862 F.3d 914, 919 (9th Cir. 2017)
9 (confirming that a petitioner granted equitable tolling is “entitled to use the full one-year statute-
10 of-limitations period” excluding the period during which exceptional circumstances prevented
11 timely filing).

12 **IT IS THEREFORE ORDERED** that petitioner’s motion for relief from judgment
13 under Rule 60(b) (ECF No. 199) is DENIED. Beyond the court’s lack of jurisdiction to grant
14 relief, the court concludes that the motion otherwise fails to establish grounds for relief from
15 judgment or raise a substantial issue sufficient to warrant remand.

16 **IT IS FURTHER ORDERED** that a certificate of appealability is DENIED.

17 **IT IS FURTHER ORDERED** that the Clerk shall add Aaron D. Ford, Attorney General
18 of the State of Nevada, as counsel for respondents, and electronically serve a copy of this order
19 upon the respondents.

20 Dated: January 23, 2020

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22 U.S. District Gloria M. Navarro
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